Oversea-Chinese Banking Corp Ltd v Frankel Motor Pte Ltd and Others
[2009] SGHC 76

Case Number : Suit 775/2007, RA 300/2008

Decision Date : 31 March 2009

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : G Mohan Singh (G Mohan Singh) for the appellant; Loke Pei-Shan (Rajah & Tann LLP) for the respondent

Parties : Oversea-Chinese Banking Corp Ltd — Frankel Motor Pte Ltd; Ho Yik Fuh; Teo Kok Ping Jemme; Teo Kian Pheng Alvin

Civil Procedure – Judgments and orders – Application to set aside default judgment – Whether defendant was properly served with writ – Test for setting aside regular default judgment – Whether there was prima facie defence in the sense of showing that there were triable or arguable issues – Plea of non estfactum

31 March 2009 Judgment Reserved.

Kan Ting Chiu J:

1 The appellant, Ho Yik Fuh, is the second defendant in this action. The plaintiff, Oversea-Chinese Banking Corporation Limited, had entered judgment against him in default of appearance after effecting service on him by substituted service. The plaintiff had obtained an order of court on 21 December 2007 to effect service of the writ on the appellant by posting it at the appellant's last known address at 35 Simei Street 4 #10-03 Modena Singapore 529869 ("the Simei address"). Service under the order of court was effected on 8 January 2008 and default judgment was entered on 17 January 2008.

2 The plaintiff had sued the first defendant, Frankel Motor Pte Ltd ("Frankel Motor"), a customer of the plaintiff to which the plaintiff had granted banking facilities. The plaintiff also sued three directors of the company, including the appellant, who had stood guarantee for Frankel Motor.

3 The appellant's application stated that the grounds of the application are set out in the affidavit filed in support of the application. In that affidavit, he deposed:

> 3. I am residing at [69A Frankel Avenue Singapore 458197]. I believe that all my records with the authorities show that I am residing at the abovementioned address. My NRIC indicates the same as well.
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> 4. Sometime in the third week of March 2008 I went to 35 Simei Street, #10-03 Modena Singapore 529869 which is property owned by me and which was vacant at that time and which I wanted to sell. My agent is marketing it now. I have not been there for about a number of weeks. I went there to check the condition and to see any mail. When I reached there I discovered a Originating Summons (Creditor's Bankruptcy Application) on the floor near the door. I wish to say that prior to the bankruptcy application which I found I had no notice of any action or claim by the Defendants. Only later after my solicitors received the documents from the Defendants lawyers did I discover that there has been a judgment filed against my company Frankel Motor Pte Ltd, the other directors and myself. I was shocked.

5. Worst so that the judgment against me was for a guarantee that I allegedly signed. I do not remember signing any guarantee. At the time I am alleged to have signed the guarantee Frankel Motor needed some financing. A bank officer came to our office and left a stack of documents about more than half inch thick with tabs markings and later he called to say asking all the directors to sign where the pages were tabbed and a cross (x) marked indicating the space where the directors were to sign. The bank officer did not explain or told me that it involve any personal guarantee by the directors. All I knew that Frankel Motor was seeking some financing facilities and some documents had to be signed.

6. I did not receive any writ of summons. I have not been staying at the address known as 35 Simei Street 4, #10-03 Modena Singapore 529869 since November 2007. I have also caused to have my address changed in my NRIC in early December 2007. I and my family were no longer residing there and the place was vacant. …

7. I verily belief that there has been no proper service of the Writ of Summons on me nor had I receive any copy of the order of court for substituted service and neither had I received the Judgment in default of appearance before the bankruptcy proceedings against me.

4 From his affidavit, it can be seen that the appellant was relying on two grounds to set aside the judgment namely:

(i) he was not residing at the Simei address since November 2007, and had changed the address in his NRIC in early December 2007 to 69A Frankel Avenue, and

(ii) he does not remember signing any guarantee because no one explained or told him that any personal guarantee was required from the directors of Frankel Motor.

5 The appellant's application was first heard by an assistant registrar, and was dismissed and he appealed against that decision. In the course of the appeal before me, his counsel raised further grounds in support of the application not pleaded in the application or the affidavit filed in support, which I disregarded.

The appellant's address

6 The appellant's Simei address had been inserted in the loan documents between the plaintiff and Frankel Motor. From the outset, when the plaintiff issued its letter of offer to Frankel Motor on 22 April 2005, the appellant was named as one of the required guarantors and his address was stated as the Simei address. When the appellant executed the guarantee on 25 April 2005, the same address was used in the document.

7 When the plaintiff applied for the writ to be served by substituted service at the Simei address, it was on the basis that it was the address of the appellant last known to the plaintiff. In support of the plaintiff's application, an affidavit by the plaintiff's solicitors' clerk was filed on 19 December 2007 in which he deposed that he went to the Simei address on 13 and 17 December 2007 to serve the writ on the defendant but was informed by the defendant's wife on each occasion that he was not in.

8 Before making the application, the plaintiff's solicitors had made a search on the Simei address which showed that the appellant was one of the two owners of the property and that property was owner-occupied. The solicitors apparently took heed to comply with the guidelines for such applications laid down in the Singapore Civil Procedure 2007 (Sweet & Maxwell Asia 2007) at 62/5/5:

> Substituted service by posting on front door – Service by posting on the front door of the last known residential address of the person to be served may be ordered, but only where there is some reason for believing that such mode of service will bring the document to the defendant's knowledge. The most common fact scenario would be where two unsuccessful attempts at personal service have been made at the said address, and on either or both occasions, the person effecting service is informed by someone apparently reliable (e.g. an occupant or neighbour) that the defendant is not present to accept service. In such circumstances, as the defendant is apparently still residing at the said address, it would be appropriate to obtain an order of court for substituted service by posting the document on the front door of the premises. In contrast, if, on both occasions, the person attempting personal service finds the premises locked, and no one is around, the court would then require some evidence to show that substituted service by way of posting on the front door of the said premises would be effective in bringing the document to the attention of the defendant. In such circumstances, the affidavit supporting the application for substituted service by posting on the front door must exhibit either: (1) a recent property tax search showing that the defendant is owner of the premises in question, and that the property tax rate is four per cent (and hence that the premises are owner-occupied); or (2) a recent Singapore Land Registry search showing the address of the property in respect of which the search is conducted, and showing that the defendant is owner of the premises; or (3) a recent ACRA search showing the residential address of the defendant; or (4) other such evidence, to the satisfaction of the registrar.

9 The appellant's case is that he was not residing at the Simei address when the attempts at service were made and when substituted service was effected there. He acknowledges that he continued to own the property up to and after the plaintiff entered judgment against him, and he does not dispute the evidence of the service clerk who attempted to serve the writ on 13 and 17 December 2007 at the Simei address that on each occasion he was informed by the appellant's wife that he was not in.

10 Although the appellant registered the change of his address with the National Registration Office in early December 2007, he did not inform the plaintiff of the change. As his address registered with the National Registration Office is not accessible to the plaintiff or its solicitors, the Simei address was the last address of the appellant known to the plaintiff, and it cannot be criticised for attempting service and applying for substituted service at that address.

11 When the plaintiff effected service of the writ by substituted service, it was done under the authority of the court. The Singapore Court Practice 2006 (Lexis Nexis 2006) state at 62/5/1:

> The effect of substituted service carried out pursuant to an order of court is 'equivalent for all purposes to actual service' (*Watt v Barnett* (1878) 3 QBD 363, at 366). The document will be regarded as being properly served even though the defendant is not aware of the action against him. Accordingly, once substituted service has been executed and no appearance is entered, the plaintiff may obtain judgment. This is subject to the right of the defendant to apply to the court to set aside the judgment on the merits.

While it is not clear in this passage whether an application should be made to set aside the order for substituted service as well as the judgment entered, there is authority that the defendant should apply to set aside the order for substituted service.

12 In *Watt v Barnett* (*ibid*), Jessel MR indicated that the order for substituted service should be set aside when he held at p 366 that:

> The Court, when an application for leave to effect substituted service is made, decides as to the propriety of granting it, and if service is effected according to the order of the Court it is, *while the order remains undischarged*, equivalent for all purposes to actual service. I agree, however, with both the learned judges that, though the service may have been regular according to the order, still the Court has power to set aside the judgment where that is necessary for the purpose of doing substantial justice. The mere fact that the defendant has not had notice of the proceedings is not of itself sufficient; to hold it to be so would in fact be setting aside the order for substituted service. But if he shews that he had no notice, and that he has a good ground of defence, it is reasonable that he should be let in to defend.
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> [emphasis added]

13 The Singapore Court Practice 2006 also referred to the decision of the Malaysian Supreme Court in *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd & Anor* [1995] 3 MLJ 472 which held that other than in exceptional circumstances, the validity of an order for substituted service may only be challenged by proceedings instituted for that purpose, and not collaterally in related proceedings.

14 Having regard to these views, there are two avenues open to a party against whom judgment in default has been entered subsequent to substituted service to set aside the default judgment. It can:

> (i) apply to set aside the order for substituted service, and proceed to have the default judgment set aside on the basis that it is an irregular judgment, or
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> (ii) apply to set aside the judgment on the basis that it is a regular judgment, and proceed to have it set aside on merits.

15 In the present case, the appellant had not applied to set aside the order for substituted service, and if he had done that, the order would not be set aside because he had not made out a case for it to be set aside.

Setting aside a default judgment

16 The law relating to the setting aside of default judgment have been examined at and considered by the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR 907 ("*Mercurine*").

17 In this landmark decision, the Court reviewed the principles applied by the courts of Singapore and other jurisdictions in dealing with applications to set aside default judgments. It then set out the proper bases for setting aside such judgments.

18 The Court concluded by laying down two bases. The first basis, set out in [60] of its judgment, is that:

> [I]n deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues. It is … rather illogical to hold that the test for setting aside a regular default judgment should be any stricter than that for obtaining leave to defend in an O 14 application.

This represents a reversion to the test set out by the House of Lords in *Evans v Bartlam* [1937] AC 473 in favour of the test set by the English Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Inc; The "Saudi Eagle"* [1986] 2 Lloyd's Rep 221 which was accepted and applied in Singapore by the Court of Appeal in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484.

19 The second basis, set out in [74] is that:

> [T]he *ex debito justitiae* rule remains relevant despite the wide discretion conferred on the courts to uphold or vary irregular default judgments. In our view, this rule should continue to be the starting point *vis-à-vis* setting-aside applications involving irregular default judgments as the expectation that litigants should observe procedural rules cannot be lightly compromised.

The *ex debito justitiae* rule the Court referred to is the rule in *Anlaby v Praetorius* (1888) 20 QBD 764 that a defendant is entitled to set aside an irregular default judgment as of right.

20 In the present case, as the appellant had not shown that the order for substituted service was improperly obtained or that the default judgment was entered improperly, the law to be applied is the test for setting aside regular judgments, i.e. to succeed, the applicant has to present a defence on merits.

Should the judgment against the appellant be set aside?

21 Applying the first test set out in *Mercurine*, the question is whether the appellant can establish "a *prima facie* defence in the sense of showing that there are triable or arguable issues".

22 To recapitulate, the appellant deposed in his affidavit that:

> I do not remember signing any guarantee. At the time I am alleged to have signed the guarantee Frankel Motor needed some financing. A bank officer came to our office and left a stack of documents about more than half inch thick with tabs markings and later he called to say asking all the directors to sign where the pages were tabbed and a cross (x) marked indicating the space where the directors were to sign. The bank officer did not explain or told me that it involve any personal guarantee by the directors. All I knew that Frankel Motor was seeking some financing facilities and some documents had to be signed.

23 The appellant stops short of denying that he signed the guarantee. He claims that he does not remember signing any guarantee, and that does not amount to a defence. He acknowledged that a bank officer had delivered the documents for signature and he knew that the documents were for the financial facilities for Frankel Motor. He implies that when he signed the documents, he was not aware that they included a guarantee. He is therefore raising the defence of *non est factum* in respect of the guarantee.

24 Has he shown a sufficient basis to raise a defence of *non est factum*? He is a director of Frankel Motor and was actively involved in the company's affairs. He is sufficiently proficient in the English language to have signed his affidavit without the need for translation. The plaintiff's offer of facilities was conditional to the appellant issuing his personal guarantee. The appellant had signed Frankel Motor's acceptance of the offer as well as Frankel Motor's directors' resolution to accept the plaintiff's offer. The guarantee the appellant signed had the words 'personal guarantee' printed in large capital letters at the top of the document, and it was stated in clear terms that the three guarantors were giving their irrevocable and unconditional guarantees to the plaintiff in connection with the financial facilities extended to Frankel Motor. At the end of the document, the appellant had

placed his signature above the printed and typewritten words "Guarantor's Name: Ho Yik Fuh".

25 The defence of *non est factum* is explained succinctly in Halsbury's Laws of Singapore, Vol 7 (2005 Reissue Lexis Nexis Singapore) at [80.169], [80.170] and [80.171]:

> As a general rule, the signature to a document by a person of full age and understanding binds him whether or not he read or understood it. However, where a party can show that the signed instrument is radically different from that which he intended to sign and that his mistake was not due to his carelessness, he will escape liability in an action against him on the basis of *non est factum*. Whilst fraud is present in most cases of *non est factum*, it is not a requirement that fraud be present. The basis of the doctrine is the lack of consent, and not the means by which this result is obtained.
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> …
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> The doctrine of *non est factum* can only be pleaded where the signer had made a fundamental mistake as to the character or effect of the document. The degree of difference that must exist between the document actually signed and the document it was believed to be has to be 'radical', 'essential', 'fundamental' or 'very substantial'. Ultimately, the question depends on the circumstances of each case.
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> …
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> Negligence or carelessness on the part of the person signing the document excludes the defence of *non est factum*. Similarly, a person who is ignorant of (as opposed to being mistaken about) what he is signing cannot plead *non est factum*.

26 As the appellant knew that he was signing documents in connection with the financing facilities extended to Frankel Motor, and the guarantee was an integral part of the financial arrangement, it cannot be said that he had made a fundamental mistake on the character and effect of the guarantee he signed. Furthermore, in view of the prominent presence of the words "personal guarantee" and "guarantor's name" on the guarantee executed, even if the appellant did not realise that he was signing a guarantee, his negligence and carelessness in being so oblivious about the document he was signing disentitle him from pleading *non est factum*.

27 The appellant had not raised any defence on merits to set aside the regular default judgment that was entered against him. The appeal is dismissed with costs fixed at $1500 and disbursements.